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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 134

MAJOR RAYMOND LISENBA,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

MORRIS LAVINE,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 134

MAJOR RAYMOND LISENBA (ROBERT S. JAMES),
Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

STATEMENT OF JURISDICTION ON APPEAL.

(On Habeas Corpus)

In compliance with Rule 12, appellant herewith presents his statement of jurisdiction on appeal.

A.

The statutory provisions which sustain jurisdiction are Section 237 Judicial Code (28 U. S. C. A. 344) as amended by Act of January 31, 1928, Chapter 14, 45 Stat. 54, and Act of April 26, 1928, Chapter 440, 45 Stat. 466.

B.

The Fourteenth Amendment to the Constitution of the United States is involved in said decision, and reads as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

C.

The judgment in said case was rendered by the Supreme Court of California on November 9th, 1939. An application for appeal was presented to the Chief Justice of the Supreme Court of California on December 18th, 1939, and allowed on that date to the Supreme Court of the United States.

D.

Nature of Case and Rulings Below.

The appellant is sentenced to death. His conviction and sentence resulted from a purported trial which was a mock and a sham, and therefore in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Moore v. *Dempsey*, 261 U. S. 86;
Mooney v. *Holohan*, 294 U. S. 103;
Snyder v. *Mass.*, 291 U. S. 97, 122.

The petitioner herein was charged with the murder of his wife, Mary Emma James, in California. It was alleged that she died of drowning.

Two live, hissing rattlesnakes, terrifying in their nature—a horrifying spectacle—were exposed before the jury and created such a state of fright in their minds as to bring in a death penalty verdict through passion and prejudice, and not in accordance with due process of law. Against the terrifying nature of these rattlesnakes exhibited to the women and men on the jury, appellant had no fair opportunity to defend.

Another proceeding in the trial which deprived the petitioner herein of a fair trial guaranteed by the Fourteenth Amendment to the Constitution of the United States, was the fact that during the trial of the case the appellee, People of the State of California, produced witnesses from the State of Colorado and presented evidence without any accusation ever having been lodged in Colorado, and without any proof or notice in advance that the People were to produce said testimony, that appellant had been responsible for the death of a former wife in Colorado in 1932. Appellant was without the process of any court, or without legal means to defend against the charges thus brought in California for the first time and placed before the California jury against him.

Statements purported to have been obtained from appellant by third degree methods were also introduced into the trial of the case, and grave abuses of the criminal processes and the deprivation of counsel to appellant at the time he was being questioned, in violation of his rights under the Fourteenth Amendment to the Constitution of the United States, also occurred.

The case was duly appealed to the Supreme Court of California. While said case was under appeal an alleged accomplice named Charles H. Hope, upon whose testimony the trial was principally based, repudiated his testimony and made affidavits that his testimony was false and was known to the prosecutor to be false. These affidavits were filed with the Supreme Court as a part of that proceeding and also this proceeding. The Supreme Court declined to entertain and consider said affidavits.

The judgment was affirmed on appeal by the Supreme Court of California, with a vigorous dissenting opinion by Mr. Justice Seawell, concurred in by Mr. Justice Curtis (89 P. (2d) 39). Upon rehearing the opinion was also concurred in by Mr. Justice Houser. An appeal was allowed

in said case by the Supreme Court of California to the Supreme Court of the United States.

In order to present and exhaust all our State remedies, petitioner herein presented a petition for writ of habeas corpus, pursuant to the constitution and statutes of California, to the Supreme Court of the State of California on October 31, 1939, said petition setting forth the grounds that petitioner's rights under the Fourteenth Amendment to the Constitution of the United States had each been violated by the procedure and proceedings which took place in the trial of said case. Said petition was considered by the Supreme Court on November 9th, 1939, and denied, and an appeal was allowed to the Supreme Court of the United States by Chief Justice William H. Waste on January 18th, 1940.

Quoting from the dissenting opinion of Mr. Justice Seawell of the Supreme Court of California in *People* v. *Lisenba*, 97 Cal. Dec. 467 (89 P. (2d) 39) it is stated:

> "The affidavits of R. E. Parsons and Wm. J. Clark, Esqs., defendant's attorneys, aver various acts of misconduct. They are predicated in the main on the dramatic manner in which two live rattlesnakes were brought into the courtroom in a glass-covered box some five feet in length and placed in front of the jury. The snakes as carried down the aisle shook their rattles furiously. It is not necessary to describe the consternation into which the crowded courtroom was thrown. There are some things of which the court will take judicial knowledge and this is one. The inside of the box contained smears of venom where the snakes had struck the sides of the box. This was called to the attention of the jury. The averments are that spectators rose to their feet, some gasped from nervous fear and persons nearest the aisles shrank away. Many uttered audible exclamations of fright. Counsel incorporates in his affidavit as descriptive of the scene the following account taken from the 'Los Angeles Herald Express,' a newspaper of large circulation:

"'Buzzing their hollow rattles so loudly that women in the crowded courtroom shivered and shuddered at the eerie, frightening sounds, two diamond-backed rattlesnakes glittering in their new skins today were placed on the counsel table in Superior Charles W. Fricke's court where Robert S. James, Birmingham barber, crouched ghost-faced and jittery at his trial for the murder of his golden-haired bride, Mary.

"'Paraded across the courtroom in a velvet covered venom splashed 5-foot glass cage, two deadly diamond-back rattlesnakes late today hissed and shook their hollow rattles eerily and struck out with their evil wedge-shaped heads as they were exhibited less than 2 feet away before the fascinated eyes of 10 men and 2 women who make up the jury trying Robert S. James for the murder of his golden-haired wife, Mary.'"

The "Los Angeles Examiner," another newspaper of wide circulation in Los Angeles, made the following comment:

"Men's enemy from primordial ages, the snake, yesterday was made the living, visible symbol of the Robert James murder case. Two diamond-backed rattlesnakes hissed and struck before the trial jury as a long glass box was borne forward like a hideous offering of a black ritual."

The jury was allowed to go at large, and was subjected to the constant onslaught of prejudicial and sensational news articles of a highly prejudicial character, which as pointed out in Justice Seawell's dissenting opinion, concurred in by Justice Curtis and Justice Houser, "was unquestionably communicated to the jury in every form of modern news transmission."

The bringing in of live, venomous snakes before the jury and the exhibition of a dead snake enclosed in a glass jar, with open mouth and fangs projecting from the upper jaw, was violently objected to in the trial of the case when first brought in, said objections being overruled. Thereafter, on

appeal in the Supreme Court of California, which takes over death penalty cases, the majority opinion held it was proper to bring live snakes into the courtroom while the dissenting opinion held:

> "What aid the two live rattlesnakes which were brought into the courtroom, rattling and writhing, and thus exhibited to the jury in determining the cause of death on any theory, does not appear from a painstaking examination of the entire transcript of the proceedings, and we feel satisfied that the spectacular exhibition of the rattlesnakes, in the circumstances to be hereafter noted, unquestionably constituted prejudicial error."

We contend that such a proceeding is not a trial but a mask of a trial wherein appellant was hurried to conviction, and where, just as in *Moore* v. *Dempsey*, 261 U. S. 86 "counsel, court and jury were swept to the fatal end by an irresistible wave of passion and prejudice, so that no trial in a true sense was afforded."

That third degree brutal methods, both in the form of physical violence, and in the deprivation to appellant of sleep and rest, were used upon him to coerce and extort a purported confession, and that the use in evidence of such purported confession obtained by such means and methods make void the entire trial under the due process clause of the Fourteenth Amendment to the Constitution of the United States. (*Brown* v. *Mississippi*, 297 U. S. 278; *Jones* v. *Commonwealth*, 97 F. (2d) 333.)

The details of the procedure are clearly described by Justice Seawell, in his dissenting opinion, concurred in by Justice Curtis, and on a rehearing by Justices Houser and Curtis, as follows:

> "On Sunday morning, April 19th, James was taken from his home at 3886 La Salle Avenue by Southard, Griffen and Dean, investigators, to a private house next door, 3882 La Salle Avenue, occupied by officers for

spying and dictaphone purposes, where the dictaphone's part in the case was explained to him. This was done for psychological effect. Southard said he took 'quite a crowd' with him at the time he and the officers took James to the house and exhibited to him the dictaphone apparatus. A number of newspaper men, District Attorney Fitts, Deputy District Attorney Williams, Officers Scott Littleton, Davis and Dean were among the crowd present. He was then taken to the office of Lieutenant Morgan, where he was questioned for more than an hour. He was next taken to the District Attorney's office (Sunday forenoon) where he was examined at great length and was called upon to defend himself against grave charges made by the officers. Asked if James was informed that a charge of murdering his wife was under investigation, Southard answered, 'I believe not.' Attorney S. J. Silverman, who had been James' attorney in civil matters for some time and had heard that an attempt was being made to have James indicted for the murder of his wife, and James himself, testified that Silverman had instructed James to decline to answer any questions bearing on the alleged homicide except when Silverman was present. At any rate James refused to talk after he was asked the first few questions and, according to Southard, he told Fitts 'to go to hell.' They kept right on questioning him. Mr. Williams, a deputy district attorney, Griffen and several other investigators were present. Mr. Southard said it *could have been possible* that they told him they had the goods on him. The arrangement under which James was 'worked on' was that he was placed in a large chair, where he was compelled to sit for forty-eight hours, according to the admissions of Southard and other investigators, but, on the showing in the record, the questioning must have continued for sixty hours. The investigators worked in pairs on four-hour shifts. From sheer exhaustion the defendant several times fell asleep. Never less than two and as many as eight or ten officers were plying the defendant with questions at all hours of the night. The alleged confession began to break, after

days of unremitting effort, at 1:45 o'clock in the morning. None, not even Mr. Silverman, the defendant's attorney, or Mr. Parsons, had knowledge of the place in which the defendant was held in private custody by the investigators. Neither his friends, relatives nor the public knew the place of detention. No warrant of arrest had been issued and there was no public record, or any record, which would enable any one not a member of the staff of investigators to know of or discover the presence of defendant.

"The law prescribes the place in which persons charged with crime may be detained. A private house located in a residential part of a city and not complying with the provisions of law prescribing the purpose and use of county jails and their management, is not a place where persons charged or suspected of crime may lawfully be detained. Grave abuses may be practiced against persons thus illegally held in secret confinement. (Pen. Code sec. 1597 et seq.) Every police officer who, having arrested any person upon a criminal charge, wilfully delays taking such person before a magistrate for examination is guilty of a misdemeanor (Sec. 145, Pen. Code). In the instant case the defendant was held in custody seventeen days without the issuance of a warrant and without being taken before a body which had power to examine the offense with which he was finally charged. He requested that his attorneys, first Mr. S. J. Silverman, whom the District Attorney had reported out of the city for the week end, and then Mr. R. E. Parsons, be contacted. Neither appearing to be immediately available, the inquisition in which a number of investigators took part, was vigorously and unremittingly pressed, without delay through many hours. It was not a proceeding authorized by statute and no sufficient reason was or could be shown why the request of defendant for advice of counsel, a right guaranteed by the Constitution and by statute to every person charged with crime, was not complied with. Section 849 of the Penal Code provides: 'When an arrest is made without a warrant by a peace officer * * * the person arrested must, without unnecessary

delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and a complaint, stating the charge against the person, must be laid before the magistrate.' Section 859, following the procedure above cited, provides that the magistrate must allow the defendant a reasonable time to send for counsel and may postpone the examination for that purpose. Upon *request* of the defendant, the magistrate *must* require a peace officer to take a message to any counsel in the township without delay and without fee. These and other provisions of the statute cannot be circumvented by resorting to any methods which tend to deny the rights and protection which the law guarantees to every person charged with a crime. The statutes impose quite substantial fines and terms of imprisonment upon peace officers for the wilful disregard of their duties. (Pen. Code, Secs. 145, 147, 149.)

"Early in the confinement of the defendant, Officer Southard committed an admitted battery upon him. He and Officer Griffen were 'working' on the defendant when Southard struck him, according to his admission, in the face or on the side of the head. * * * Griffen said that after James was 'slapped' they continued to question him but he saw no other violence inflicted upon him. Griffen questioned him the next night until one o'clock a. m. During all the time he was being held incommunicado he did not see James sleep. * * * James had then been questioned, admittedly for forty-eight hours. There is evidence that it was longer * * * Griffen said that James did complain about his ear, but he examined it and couldn't find anything wrong with it. When Griffen returned to the place of examination at nine o'clock five other officers were with James. At 8:30 he was taken by Officers Kynette and Davis to Ninth and Alvarado Streets. Griffen and Southard followed. At noon he was taken to the District Attorney's office. Griffen did not recall whether James, when at the District Attorney's office on the day he was taken into custody, had requested that word be sent to Mr. Silverman, his attorney, requesting his presence. On Tuesday he saw the defendant from seven o'clock to

one p. m. At eleven o'clock he gave instructions to 'book him' at the county jail where he was committed to the 'high power tank.'

"Southard admitted that the investigators operated in relays of pairs for a period of forty-eight hours. The defendant sat in a chair and was not allowed to remove his clothing. Several times he fell asleep from fatigue and exhaustion * * * it was solely Southard's disappointment in failing to have broken James down by harassment, coercion and physical violence, to a state of accepting Hope's sensational story (which was a composite product of the detectives and investigators in collaboration with Hope) which irked Southard to the point of physical violence. Southard had been an investigator for eight years and was seasoned to his task. His act was inexcusable and in violation of Section 149 of the Penal Code * * * The defendant was under no compulsion of law or duty to answer the officers in any particular manner or at all. Several apparently disinterested witnesses and one or two officers testified absolutely that James' face showed black and blue and swollen spots which were plainly visible for several days after his arrest. He testified to terrible beatings he received in the private house in which he was detained and that his body was made black and blue from the waist up and that he had suffered a hernia or rupture from the roughing which he passed through. A physician who had examined his abdomen five months prior testified that he had observed no evidence of hernia at that time but an examination since his arrest clearly disclosed the existence of a hernia. The prosecution called a few witnesses connected with the official staff who testified they did not observe any bruises on the defendant's face, but in the main their testimony was more in avoidance of direct and positive answers which should have been given by officers of the law. There can be no possible doubt, as testified to by one or two of the officers themselves, and by independent parties, that the defendant's ears bore marks and bruises which any one at all observant should have seen. James says he was practically made hard of hearing

by the head beating he had received from Southard and Griffen and that his body was black and blue from the waistline upward * * * Southard said he gave instructions that James was not to be left alone at any time; one or more investigators was questioning him at all times; some questions he answered and some questions he refused to answer; he would just sit and look blankly. Southard testified that he had three meals a day, but James testified he was practically starved into a state in which he told the investigators he would answer any questions in any way the investigators wanted him to answer. It is the admitted fact that he was interrogated by the District Attorney and his assistant, Mr. Williams, at all hours of the night, for as many as two and a half to three hours. One period continued from one o'clock to six o'clock. The officers also took part in interrogating the defendant. The plan adopted was that the investigators worked on the defendant to a point where it was deemed expedient or advisable to take him before the District Attorney, and if satisfactory progress had not been made he would be returned to the private custody of the investigators for the employment of such methods as would work a change of mental attitude on the part of the defendant. No other possible answer could be made to their unauthorized action which only ended with the procurement of the alleged confession. At times numerous officers would be present, and sometimes, James testified, he was left with but one officer. The evidence adduced by the prosecution affirmatively shows that the defendant was shifted back and forwards in the manner herein described many times at all hours of the day and night, continuing over a long inquisitorial period. At times Hope was brought into the room and engaged James in controversial disputes * * *

"James testified at the trial that practically everything he told Killion, Southard and the District Attorney concerning his wife was the story which the investigators had drilled into him for hours for several days. He said he was not able to stand further beatings and physical punishment with which he was threat-

ened; that if he gave an answer to a question which did not suit the questioners he was struck on the head. He had also received one or two terrific beatings at the hands of Southard and Griffen; he would have preferred death rather than be returned to the private residence, which the officers had threatened to do, where most of the punishment was inflicted. The story he told Killion had been repeated a 'thousand' times to him; for days when they repeated to him Hope's story he told the officers he did not know what they were talking about until he was coerced into submission."

That the said procedure and proceedings and the use of the alleged confession in the trial, obtained in this manner, made of the trial a mock and a farce, that it degraded the proceedings to trial by ordeal, and trial by the torture chamber methods, and that such a trial is in violation of due process of law, was raised in the Supreme Court of California in this petition, and the rights claimed under the Constitution of the United States were denied on November 9th, 1939.

That such procedure and proceedings deny due process of law and are inconsistent with the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (*Hebert* v. *Louisiana*, 272 U. S. 312); that to deprive a person of sleep is a form of torture not less severe than physical violence, (*Ziang Sun Wan* v. *U. S.*, 266 U. S. 1; 69 L. Ed. 131); that use of third degree methods to extort a purported confession and use of same in a trial is in violation of due process of law. (*Brown* v. *Mississippi*, 297 U. S. 278; *Rounds* v. *State*, 106 S. W. (2d) 212; *People* v. *Dye*, 119 Cal. App. 262.)

That the defendant was deprived of the right of counsel after his arrest and while he was being interrogated by the District Attorney himself, and his staff; that he had asked for said Counsel Silverman, and was denied his presence, although the District Attorney knew he had private counsel; that he was entitled under the Constitution and laws of the

United States to be represented by private counsel of his own choice at all stages of the proceedings. That the denial of this right was a denial of rights guaranteed under the Fourteenth Amendment to the Constitution of the United States. (*Powell* v. *Alabama*, 287 U. S. 45.)

That this right was asserted by appellant in the petition for this writ as a right guaranteed under the Constitution of the United States in the due process clause of the Fourteenth Amendment, and said right was considered and on November 9th, 1939, the Supreme Court of California held against appellant and ruled that his rights under the Constitution of the United States were not violated.

That your appellant was placed upon trial in California on a charge of the murder of Mary Emma James. That without any indictment or information or other proceeding, and without any notice, or any court processes to produce witnesses, the appellee produced witnesses from the State of Colorado and introduced into the case testimony regarding the death of a former wife, Winona James, in Colorado. A large portion of the trial was devoted to this evidence, and a portion of both the majority and dissenting opinion and a large portion of argument for the people is devoted to this evidence. That appellant was without notice of any such charge, and without any court processes from California to produce witnesses in rebuttal.

That the use of this evidence was challenged as violating the basic right of due process of law, namely, to receive notice of the charge one must meet, and be given an opportunity to meet it, and that such misuse of such alleged evidence in the case contravened his rights under the Fourteenth Amendment to the Constitution of the United States.

Appellant presented said claim upon petition for writ of *habeas corpus* on October 31, 1939, and said court, on November 9th, 1939, considered said question thus presented and ruled against the claim of your petitioner and held that

no rights under the Fourteenth Amendment to the Constitution of the United States were violated.

Since the judgment was pronounced in the trial court the witness Charles H. Hope has filed with the trial court, two affidavits in which he repudiates his testimony in the trial of the case and asserts that his testimony was perjured and was known to the prosecution to have been perjured when given. That copies of said affidavits were presented to the Supreme Court of California and were considered by said court in connection with said petition for writ of *habeas corpus*, said affidavits setting forth that said conviction was based on testimony that was perjured and false in every material part.

That said petition for writ of *habeas corpus* under authority of *Mooney* v. *Holohan*, 294 U. S. 103, asked the California Supreme Court to reconsider the said case; that to sustain a conviction upon such perjured testimony was in violation of the Fourteenth Amendment to the Constitution of the United States. Such claimed right under said Fourteenth Amendment was considered on November 9th, 1939, by the Supreme Court of California and denied on that date.

That a trial based on perjured testimony is in violation of due process of law and the State which still has corrective processes, in denying them, denies due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Mooney v. *Holohan*, 294 U. S. 103;

Jones v. *Commonwealth of Ky.*, 97 F. (2d) 333.

Each of these questions raised was substantial. (*Zucht* v. *King*, 260 U. S. 174, 176, 177.) Each denied to appellant fundamental rights to a fair trial guaranteed as a part of due process of law under the Fourteenth Amendment to the Constitution of the United States.

Whether the use of live rattlesnakes in the court room constituted a denial of due process of law under the Four-

teenth Amendment to the Constitution of the United States and the equal protection of the laws, was raised on petition for writ of *habeas corpus* on October 31st, 1939. The Supreme Court of California considered petitioner's challenge on November 9th, 1939, and denied the same.

On petition for writ of *habeas corpus* presented on October 31st, 1939, petitioner challenged the use of alleged testimony obtained by third degree methods, extorted by means of physical and mental force, as a violation of the Fourteenth Amendment to the Constitution of the United States. The said challenge was considered by the Supreme Court of California and denied on November 9th, 1939.

Petitioner challenged on *habeas corpus* the introduction in evidence in the trial of witnesses from Colorado regarding the death of appellant's wife in Colorado, as a violation of the Fourteenth Amendment to the Constitution of the United States, and said challenge was considered by the Supreme Court of California and denied on November 9th, 1939.

Petitioner presented by reference two affidavits from the principal witness in the case, one Charles H. Hope, to the effect that said Hope perjured himself during the trial and that such perjury was known to the prosecuting officers, and petitioner challenged the conviction based upon such testimony as violative of due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. Such challenged right under the Constitution was denied on November 9th, 1939.

Petitioner also petitioned for a writ of *habeas corpus* on the grounds that he was deprived of counsel at the time of his interrogation, and that he was entitled to counsel at all stages of the proceedings; that such denial constituted a denial of due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. Said challenge was on

November 9th, 1939, denied by the Supreme Court of the State of California.

The trial was conducted with all the venom of the rattlesnakes which were exhibited and used to terrify the jury. In this respect it was worse than a mob trial. It commenced with a mob of policemen, District Attorney investigators, the District Attorney and his deputies breaking into the appellant's home and without legal process kidnaping him and holding him incommunicado, and engaging in admitted tortures. It resembled more a group of outlaws engaged in Lynch law in the early days of California when court procedure was ignored and an angry mob decided the fate of a man. With respect to the snakes it reverted to the barbarity of the days of trial by torture and ordeal, returning us to the rack. The use of foreign testimony from another State on a matter unrelated to this case, certainly violated every fundamental essential of due process of law and the equal protection of the laws, against which there was no opportunity to defend.

MORRIS LAVINE,
Attorney for Appellant.

Cases Believed to Sustain Jurisdiction.

Whitney v. *California*, 274 U. S. 357.
Fiske v. *Kansas*, 274 U. S. 380.
Stromberg v. *California*, 283 U. S. 359.
Fleming v. *Fleming*, 264 U. S. 29.
Cumberland Coal Co. v. *Board of Revision*, 284 U. S. 23.
Cincinnati P. B. S. & P. Packet Co. v. *Bay*, 200 U. S. 179.
Patterson v. *State of Alabama*, 294 U. S. 600.
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Mooney v. *Holohan*, 294 U. S. 103.
Herndon v. *Lowry*, 301 U. S. 242, 81 L. Ed. 1066.